80-2026

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

HOWARD BROWN,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

JAMES R. WILLIS, ESQ.
Bond Court Building, Suite 1609
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100
ATTORNEY FOR PETITIONER

JOHN T. CORRIGAN
Cuyahoga County Prosecutor
Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
216/623-7800
ATTORNEY FOR RESPONDENT

QUESTIONS PRESENTED

I

Whether due process is violated when the State is allowed to bolster their case by testimony, rendered by various detectives, that a non-testifying informant who was credited with making numerous narcotics buys for the police was totally reliable where the defense is denied the right to show, by cross examination or otherwise, the extensive criminal record of the alleged informant and other relevant facts?

II

Whether due process and the integrity of a criminal trial are offended when a trial court summarily excludes a third-party confession by an unavailable declarant, where there is sufficient indicia of the confession's trustworthiness, which confession totally exonerates the defendant?

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PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Howard Brown, prays that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on the 31st day of March, 1981, when the Supreme Court of Ohio denied further appellate review.

OPINIONS OF THE COURT BELOW

The judgment entries by the Supreme Court of Ohio denying further appellate review are set forth at Appendices "A" and "B", infra, pp. A1 and A2 in the Appendix to this Petition.

The journal entry and opinion of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "C", p. A3, et. seq.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on February 20, 1981. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved herein are set forth as Appendix "D", p. A15.

STATEMENT OF THE CASE

The underlying factual situation in this appeal is set forth in considerable detail in the Opinion rendered by the Court of Appeals (see Appendix "C", pp. A3 to A13).

While there are serious flaws in some of the assertions which the court treats as "facts" in drawing certain conclusions as to the occurrence of

various events, there appears to be no real need, beyond the insertion of a few rudimentary "facts", to correctly structure for this Court the issues in this cause. So postured, the facts and circumstances critical to this cause show that:

> "On July 31, 1978, John Wesley Martin, an informant often used by the East Cleveland and Cleveland police departments, offered to set up a 'controlled' drug buy from appellant. East Cleveland detectives Copeland and D'Agostino agreed to supply Martin with $140.00 to purchase heroin from appellant. Thus, on that date, Martin telephoned the 'Heatwave' bar, of which appellant was an owner, from a telephone in the East Cleveland police station. While both detectives listened, and the call was tape-recorded, Martin spoke with a man, identified to be appellant by means of voice identification by Detective Copeland, who agreed to have two men driving a green Volkswagen meet Martin at a certain spot to consummate the sale of heroin. Subsequently, Martin met two men in a green Volkswagen at the specific location, entered the car and drove around with the men for a few minutes, and when let out of the car returned to the detectives with a quantity of brown powder identified as heroin by an Ohio Bureau of Criminal Identification and

> Investigation chemist. During this entire drive, the green Volkswagen and its occupants were kept under continual surveillance by Detectives Copeland and D'Agostino, as was Martin while he was picked up and dropped off by the car's occupants.
>
> The only evidence at trial connecting appellant to the crime was a tape recording and testimony of Detectives Copeland and D'Agostino relative to the telephone conversation had by Martin, plus a transcript of that conversation." (Appendix "C", pp. A4 to A6.)

Indeed it was petitioner's contention that, in addition to not being one of the conversants, he was willfully framed. To support this thesis, he called as witnesses Thomas Bradford and Charles King who were indicted with him to testify. Both of these witnesses took the Fifth Amendment for reasons which cannot be validated but which were nonetheless credited by the trial judge (R 262-270; 271-277).[1]

Also called was attorney Raymond J. Grabow who recalled a meeting he had with Bradford in his office (R 241). Bradford then signed an affidavit which affirmed that he, Bradford, did not

---

1/ References to the transcript of the proceedings in this cause will be designated herein by the prefix "R".

know Howard Brown when he committed the offense attributed to him. As put by Bradford in his affidavit, Martin had approached he and King with a scheme which entailed Bradford answering the pay phone in the Heatwave Bar and pretending he was Howard Brown. The stated purpose of this scam was to con the police (R 247). The trial judge refused to allow Grabow to testify as to the contents of the affidavit. In addition, the statement in the Opinion below to the contrary notwithstanding (Appendix "C", p. A12), the following segment of the Record can only be read as a specific rejection by the court to allow the affidavit into evidence:

> THE COURT: On what theory do you claim that it is proper to receive an affidavit in this matter from a potential witness instead of having the witness on the stand?
>
> MR. JACOBS: May it please the Court, the Affidavit was prepared by Mr. Grabow. Mr. Grabow was not the attorney for Mr. Bradford. The Affidavit is an admission against interest by Mr. Bradford and an admission against interest is permitted under all rules of evidence. If necessary we can get -- I think the Supreme Court of the United States has even ruled on that issue. This man while under indictment for this crime gave a statement admitting that he was the recipient of a telephone call at the Heatwave Lounge and that he in conjunction with John Martin were attempting to participate in a

con to secure $140. I submit that that admission of interest is a valid document that can be introduced into evidence whether or not the witness himself does or does not testify.

There is no necessity to taking his deposition.

THE COURT: I don't know of any provisions for the receipt of such an Affidavit.

MR. NOLAN: I don't either.

THE COURT: I'll sustain the objection.

(R 247-248)

In addition, the Record also shows, despite the categorical statement in the Opinion (at p.A11) that "the Record reveals no attempt to introduce the affidavit itself into the evidence," the following critical colloquy developed:

MR. JACOBS: And A I would offer to introduce into evidence, the Affidavit of --

THE COURT: Bradford?

MR. JACOBS: -- Bradford, your Honor.

THE COURT: Objection sustained.

(R 290-291)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

Perhaps starting with Justice Holmes' dissent in Donnelly v. United States, 228 U.S. 243, 278 (1913), the trend has been toward admitting statements made against a declarant's penal interest. This trend can be said to have fully matured in Chambers v. Mississippi, 410 U.S. 284 (1973) and Rule 804(b)(3), Federal Rules of Evidence. (Ohio's Rule 804(B)(3) is identical.)

The impact of Chambers, which declared a third party's confession was admissible on due process grounds (despite the fact Mississippi did not have a penal interest exception to its hearsay rule), augmented by the absolute right of an accused to introduce evidence free of "arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of prior categories that presume them unworthy of belief" (Washington v. Texas, 388 U.S. 14, 22 [1967]), makes the position taken here by the State court totally indefensible.

This reasoning seems to be especially compelling when Ohio v. Roberts, 448 U.S. 56 (1980), is also considered. For this Court could not possibly have meant to say in Roberts that for the prosecution to admit against an accused's third party declarations, it need only satisfy some "firmly rooted" hearsay rule exception but where, as here, the evidence is offered by the defense on the basis of the penal interest exception, or under

Chambers, more is required than a sufficient "indicia of reliability," Dutton v. Evans, 400 U.S. 74 (1970). Surely then, any requirement that an accused must meet a higher burden than Roberts imposes on the prosecution obviously offends due process. Thus, this case furnishes the Court with a situation where a third-party confession, totally exonerating this petitioner, was arbitrarily excluded for reasons that cannot be defended.

ARGUMENT I

DUE PROCESS IS VIOLATED WHEN THE STATE IS ALLOWED TO BOLSTER THEIR CASE BY TESTIMONY, RENDERED BY VARIOUS DETECTIVES, THAT A NON-TESTIFYING INFORMANT WHO WAS CREDITED WITH MAKING NUMEROUS NARCOTICS BUYS FOR THE POLICE, WAS TOTALLY RELIABLE AND THEN DENYING THE DEFENSE THE RIGHT TO SHOW, BY CROSS-EXAMINATION OR OTHERWISE, THE EXTENSIVE CRIMINAL RECORD OF THE ALLEGED INFORMANT AND OTHER RELEVANT FACTS.

The appellate court, rather arbitrarily in our judgment, concluded that the jury's consideration of substantial testimony by various detectives describing their past dealings with the non-testifying informant (even though all cross-examination relevant to such testimony was barred on the basis of State's objections) was "if error... harmless." And, that in any event, since "Martin's past criminal activities were irrelevant to proof of the prosecutions' case" (Appendix "C", p.A11), it was not error to refuse cross-examination in this area.

For those of us who have been repeatedly victimized by the penchant of this particular Court of Appeals for divining reasons after the fact upon

which to excuse the State for having prejudiced a defendant, even by patently irrelevant evidence, the decision made here by them was no real surprise. Yet, it does seem strange that our Court of Appeals, which so readily concludes when the situation is reversed that such things as "the defense opened the door", or that the prejudicial "evidence was admissible" for some sophisticated purpose that had not even occurred to the proponent or the court (and surely had not been offered for such purpose) could not bring itself to conclude this petitioner was victimized.

For our part, it was simply unfair and a definite due process violation, for the trial court to have allowed the State to prove to the jury a particular scoundrel (who was not available to testify), was a good and reliable person who regularly operated as an informant for the testifying officers. And, then deny the defense the right to a searching cross-examination to show the jury just who that informant really was. Had this type of cross-examination of the detectives, who stated the informant was reliable (R 173), been allowed; the jury would have been able to make a meaningful assessment of the role attibuted by the prosecutor to this missing witness.

Viewed in this context, the examination sought to be made related to matters that were relevant both to the credibility of the detectives and to accuracy of their opinions conveyed to the jury that the informant was a very good citizen.

ARGUMENT II

DUE PROCESS AND THE INTEGRITY OF A CRIMINAL TRIAL ARE OFFENDED WHEN A TRIAL COURT SUMMARILY, AND ARBITRARILY, EXCLUDES A THIRD-PARTY CONFESSION BY AN UNAVAILABLE DECLARANT, WHERE THERE IS SUFFICIENT INDICIA OF THE CONFESSION'S TRUSTWORTHINESS, WHICH CONFESSION TOTALLY EXONERATES THE DEFENDANT.

In dealing with the various issues implicated under this Argument, the appeals court first erroneously concluded no effort to introduce the Bradford affidavit was made and that Grabow's testimony as to its contents was clearly hearsay. (Cf., Appendix "C", p.A12, with R 290-291.)[2] As to the further conclusion that such testimony was hearsay because it was an attempt "to have Grabow testify to the contents of a statement made by Bradford" and the ruling that since the Record did not show any exception to the Hearsay Rule was applicable "the relevant assignment was without merit" (Appendix "C", pp.A11 and A12), the following analysis is a complete response.

Here we start with an idea that seems especially clear. The invocation

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2/ This segment of the Record is quoted above at pp. 5-7 of this Petition for Writ of Certiorari.

of the Fifth Amendment by Bradford made him unavailable as a witness for the defense. See State v. Williams, 43 Ohio St.2d 88 (1975). Also see Rule 804(A)(1), Ohio Rules of Evidence, which encompasses situations where the declarant is exempted from testifying by a ruling of the court sustaining the assertion of the Fifth Amendment.

Dealing first with the court's view that no exception to the hearsay rule fits this situation, it seems obvious the court either ignored, or was simply oblivious to, the statement or admission against interest concept. See, e.g., United States v. White, 553 F.2d 310 (2d Cir. 1977), and United States v. Bagley, 537 F.2d 162 (5th Cir. 1974). Also see Rule 804(b)(3), Ohio Rules of Evidence. Here, it is provided:

> "The following (is) not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

Of course, whether a particular statement is against the declarant's penal interest presents is a question of law. Granted, any determination of the statement's trustworthiness necessarily requires a review of the facts. On appeal, this also entailed a review of the trial court's application of the appropriate legal standard to those facts.

To be admissible under 804(b)(3), and the response of in Federal courts in comparable situations is persuasive, a statement must meet three tests: (1) the declarant's testimony must be unavailable, (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable man in his position would not have made the statement unless he believed it to be true, and (3) the statement, if offered to exculpate the accused, must be corroborated by circumstances clearly indicating its trustworthiness. United States v. Thomas 571 F2d 285 (5th Cir. 1978).

so construed, Rule 804(b)(3) would surely accommodate both direct and indirect confessions of criminal responsibility. In either case, the declarant's statement must, in a real and tangible way, subject him to criminal liability. Obviously, statements consisting principally of material exculpating a co-defendant are suspect in the absence of concurrent presence of solidly inculpatory statements against the penal interest of the declarant. Thus, courts consider the following factors relevant to trustworthiness: 1) the time of the declaration, 2) the party to whom it is

made, 3) the existence of corroborating evidence, 4) the extent to which the declaration is actually against the declarant's penal interest and 5) the availability of the declarant as a witness. See United States v. Hoyos, 573 F.2d 1111 (9th Cir. 1978), and United States v. Lang, 589 F.2d 92 (2d Cir. 1978).

For our part, the fact that attorney Grabow's evidence qualified as an exception to the Hearsay Rule under our Rules of Evidence makes it most clear Howard Brown was denied relevant evidence by a flagrantly erroneous ruling. This is so despite the rather clear that our rules were only adopted after this case was tried.

In any event, Rule 804, in the context here being urged, is a mere formalization of the law as it existed before the Rules. See State v. Williams, 43 Ohio St.2d 88 (1975). And, the case of Chambers v. Mississippi, 410 U.S. 284 (1973), makes it rather clear that an accused's right to due process is violated when the trial court excludes a confession of another exculpating the defendant. See, Comments, Constitutional Restraints on Exclusion of Evidence in Defendant's Favor, 73 Mich. L. Rev. 1465 (1975).

Still another case is United States v. Atkins, 558 F.2d 133 (3d Cir. 1977). There it was held to be reversible error to exclude a hearsay third party confession where there was sufficient corroborating circumstances indicating trustworthiness of the statement. As put by

the court, the "exclusion of the third party confession undermined the integrity of the trial" (558 F.2d, at 136). In United States v. Bagley, cited above, the deliverer of heroin to the declarant, who by trial time had died (hence was unavailable), said deceased told defendant the item was innocent valium and also that he had given it to him by mistake. There the court reasoned that "whether the statement was against the declarant's personal interest presented a question of law." Further, that any review of the finding of fact by the trial court on this point "will also require review of the trial court's application of a legal standard to these facts" (537 F.2d, at 165-166).

These latter cases show beyond per adventure the logic in our position that the Rule only states the law as it existed before and that is what is really involed in a due process consideration going to the integrity of the trial.

On the other hand, it could not be clearer that the trial court, doubtless because he was convinced the trial prosecutor really knew what he was talking about in voicing his objection, failed to even consider the facts here bearing on corroboration -- the most significant being the fact that it was made under penalty of perjury.

Specifically, and this tenet is controlling here, this Court in Chambers, supra, noted that "few rights are more fundamental than that of an accused to

present witnesses in his own defense." Id., at 302. What, of course, is being contended here is that because this persuasive evidence was excluded, petitioner was deprived of needed substantiation for his defense. Thus, this further deprived this petitioner of a fair opportunity to defendant against the indictment.

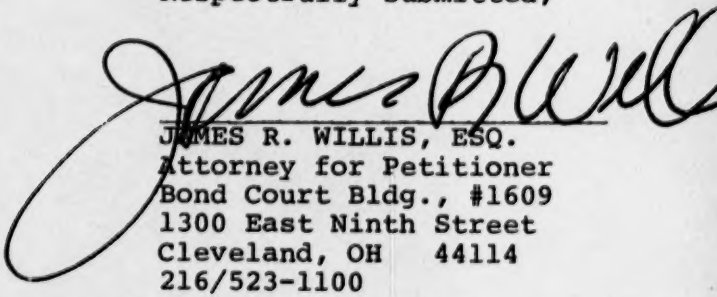
What makes Chambers all the more significant here are the closely analogous circumstances in the two cases. In Chambers, the State's Hearsay Rule prevented the defense from introducing evidence through independent witnesses that another person had actually confessed and, by so doing, exonerated the defendant. In reversing the conviction and ordering a new trial, this Honorable Court concluded Chambers' defense was "far less persuasive than it might have been" had the other confession been admitted." Id., at 294.

In our case, Howard Brown sought to introduce, through an independent wtness, testimony showing Bradford had confessed to being the person in whose place Howard Brown was being tried. This evidence, pure and simple, which thoroughly incriminated himself, would have exonerated Howard Brown. Since the court excluded this proffered evidence, Brown's defense was "far less persuasive than it might have been" to use the Chambers terminology.

CONCLUSION

The Court of Appeals resolved the central issue here by simply concluding that the accused did not demonstrate any exception to the hearsay rule was applicable to these facts. Since it has been shown that much more is involved in the proffer of a third-party confession, particularly when it totally exonerates the accused, than hearsay considerations, the positions taken by the courts below, simply put, offend due process. For these reasons alone, this cause should be reviewed and reversed.

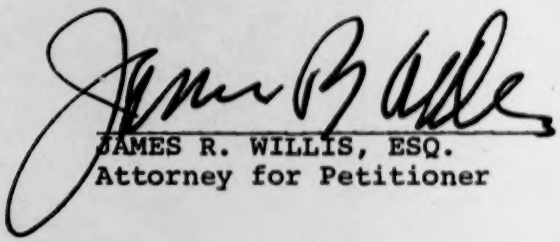
Respectfully submitted,



JAMES R. WILLIS, ESQ.
Attorney for Petitioner
Bond Court Bldg., #1609
1300 East Ninth Street
Cleveland, OH 44114
216/523-1100

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to the office of John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, OH, 44113, this 29th day of May, 1981.



JAMES R. WILLIS, ESQ.
Attorney for Petitioner

APPENDIX

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO City of Columbus.	))	1981 Term To wit: March 31, 1981

State of Ohio, Appelle,	)No. 81-72)MOTION FOR LEAVE TO
vs.	)APPEAL FROM THE COURT)OF APPEALS
HOWARD BROWN, Appellant.	))for Cuyahoga County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Affidavit of Poverty.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19....

.....Clerk

.....Deputy

APPENDIX "A"

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO City of Columbus.	))	1981 Term To wit: March 31, 1981
State of Ohio, Appelle, vs. HOWARD BROWN, Appellant.		)No. 81-72)APPEAL FROM THE COURT)OF APPEALS)))for Cuyahoga County)

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

.....Clerk

....Deputy

APPENDIX "B"

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
County of Cuyahoga

No. 42021

STATE OF OHIO, Appellee,	Appeal From Common Pleas Court No. CR 43193
-vs-	
HOWARD BROWN, Appellant.	JOURNAL ENTRY AND OPINION

DATE: .....

KRENZLER, C.J.

This cause came on to be heard upon the pleadings and the.....transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following dissipation made:

Appellant Howard Brown was indicted and charged with drug trafficking, a violation of R.C. 2925.03, and permitting drug abuse in violation of R.C. 2925.13. He was tried before a jury in the Cuyahoga County Court of Common Pleas, and the jury rendered its verdict of guilty to both charges on November 29, 1979. Apellant was sentenced to one to ten years incarceration for the drug trafficking offense and six months for the second offense on February 1, 1980. Appellant

APPENDIX "C"

filed a timely Notice of Appeal of both convictions, and sets forth the following assignments of error for our consideration:

I. THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO SUPPRESS CERTAIN EVIDENCE.

II. THE COURT ERRED IN ALLOWING THE PROSECUTION TO ELICIT TESTIMONY, OVER OBJECTIONS, CONCERNING THE PAST ACTIVITIES OF THE POLICE INFORMANT, JOHN WESLEY MARTIN: AND CONCERNING HIS "RELIABILITY": ALTERNATIVELY, THE COURT ERRED IN REFUSING DEFENSE COUNSEL THE RIGHT TO CROSS-EXAMINE THE STATE'S WITNESSES REGARDING THE PRIOR CRIMINAL RECORD OF JOHN WESLEY MARTIN. DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO HAVE BEEN CONFRONTED BY HIS ACCUSERS, WHEN THE STATE FAILED TO PRODUCE JOHN WESLEY MARTIN AT THE TRIAL OR TO MAKE HIM AVAILABLE OR PROVIDE AN ADDRESS FOR THE DEFENDANT TO HAVE SUBPOENAED HIM.

III. THE COURT ERRED IN REFUSING TO PERMIT DEFENSE WITNESS RAYMOND GRABOW FROM TESTIFYING IN REGARD TO AN AFFIDAVIT HE OBTAINED FROM ONE THOMAS BRADFORD, JR: ALTERNATIVELY, THE COURT ERRED IN NOT ADMITTING THE AFFIDAVIT IN EVIDENCE.

IV. THE COURT ERRED IN OVERRULING DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL.

V. THE VERDICT IS NOT SUSTAINED BY SUFFICIENT EVIDENCE.

VI. THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

VII. THE VERDICT IS CONTRARY TO LAW.

Briefly, the facts as testified to at trial are as follows: On July 31, 1978, John Wesley Martin, an informant often used by the East Cleveland and Cleveland police departments, offered to set up a "controlled" drug buy from appellant. East Cleveland detectives Copeland and D'Agostino agreed to supply Martin with $140.00 to purchase heroin from appellant. Thus, on that date, Martin telephoned the "Heatwave" bar, of which appellant was an owner, from a telephone in the East Cleveland police station. While both detectives listened, and the call was tape recorded, Martin spoke with a man, identified to be appellant by means of voice identification by Detective Copeland, who agreed to have two men driving a green Volkswagen meet Martin at a certain spot to consummate the sale of heroin. Subsequently, Martin met two men in a green Volkswagen at the specified location, entered the car and drove around with the men for a few minutes, and when let out of the car returned to the detectives with a quantity of brown powder identified as heroin by an Ohio Bureau of Criminal Identification and Investigation chemist. During this entire drive, the green Volkswagen and its occupants were kept under continual surveillance by Detectives Copeland and D'Agostino, as was Martin while he was picked up and dropped off by the car's occupants.

The only evidence at trial connecting appellant to the crime was the tape recording and testimony of Detectives Copeland and D'Agostino relative to the telephone conversation had by Martin, plus a transcript of that conversation.

I.

Appellant's first assignment of error asserts that the trial court erred in denying appellant's motion to suppress the tape of the telephone conversation and the transcript thereof.

No written motion to suppress appears in the record to indicate the grounds for the motion. It is clear from appellant's brief on appeal, however, that the ground asserted is a violation of appellant's Fourth Amendment right to be free from unreasonable search and seizure. In this regard, appellant draws our attention to the oft-cited case of United States v. McKeever, (S.D.N.Y. 1958), 169 F.Supp. 426, rev'd on other grounds (2d Cir. 1959), 271 F.2d 669. In McKeever, it was held that the following criteria must be met in order for a tape recording to be admitted into evidence:

> "(1) That the recording device was capable of taking the conversation now offered into evidence.
>
> "(2) That the operator of the device was competent to operate the device.
>
> "(3) That the recording is authentic and correct.

"(4) That changes, additions or deletions have not been made in the recording.

"(5) That the recording has been preserved in a manner that is shown to the court.

"(6) That the speakers are identified.

"(7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement." 169 F. Supp. at 430.

The first six criteria are evidentiary factors relative to the competency of the evidence, and appellant does not contend that the first five were not met, nor would the record indicate any lack of proper evidentiary foundation as to these factors.

Appellant does contend that the sixth criterion, identification of the speakers, was not fulfulled.[1] The applicable rule of law as to admissibility of a recording is that the speakers must be identified by a person who has heard the voice of the speaker at a prior time. United States v. McMillan, (8th Cir. 1974), 508 F.2d 101, 105, cert. denied (1975), 421 U.S. 916; see Bedford Heights v. Tallarico (1971), 25 Ohio St. 2d 211, 216-217. At the suppression

1 Appellant makes this assertion in his argument pertaining to the fourth through seventh assignments of error. It is more properly discussed as pertinent to the denial of the Motion to Suppress.

hearing and at trial, Detective Copeland testified that he watched and listened in as informant Martin placed the telephone call, so Martin's voice has been sufficiently identified. As to the voice of appellant, Detective Copeland testified that prior to the telephone conversation he had three telephone conversations with appellant, of two or three minutes duration each, in which appellant identified himself; that he had also overheard a conversation between appellant and another; and that subsequent to the telephone conversation, he had spoken with appellant, both in person and on the telephone, on at least four occasions. This testimony was clearly sufficient to establish that the sixth criterion was met for purposes of admitting the tape recording into evidence.

Appellant also draws our attention to the seventh criterion of McKeever, that the conversation was made voluntarily, and correctly suggests that this criterion has constitutional as well as evidentiary ramifications. The evidence showed that Martin phoned the Heatwave car and sought to make a heroin purchase; and the person who answered the call readily agreed; in fact, he queried of Martin whether the deal would be consummated were he to deliver the drugs. This evidence supports the trial court's implicit finding that the telephone conversation was voluntarily conducted by appellant.

Appellant further contends that the tape recording should have been suppressed because a tape recording is not constitutionally admissible unless its

recordation was consented to. The correct rule was stated in United States v. Puchi, (9th Cir. 1971), 441 F.2d 697, cert. denied (1971), 404 U.S. 853, which held that the Fourth Amendment is not violated when either of the parties to the conversation consented to its being recorded. This rule derives from the fact that a defendant's reasonable expectation of the privacy of his conversations does not mean that "the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." Hoffa v. United States, (1966), 385 U.S. 293, 302. Thus, if an informant allows his conversations with the defendant to be electronically monitored, the defendant's Fourth Amendment rights have not been violated. United States v. McMillan, supra, 508 F.2d at 104; the additional fact of recording the conversations with the informant's consent does not render the procedure unconstitutional. United States v. White, (1971), 401 U.S. 745, 752 (opinion of White, Stewart, Blackmun, J.J. and Burger, C.J.).

The issue in this case is thus whether or not Martin consented to the tape recording of his telephone call to the Heatwave bar. The testimony of Detective Copeland, properly admitted over appellant's objection,[2] was that Martin had permitted the taping of the call. Thus, appellant's first assignment of error is not well-taken.

2/ We note that a question eliciting similar information, but in hearsay form, was objected to and the objection sustained.

II

Appellant's second assignment of error raises two issues: (1) whether the court erred in allowing the East Cleveland detectives to describe their past dealings with informant Martin but disallowing cross-examination pertaining to Martin's criminal record, and (2) whether appellant's right to confront his accusers was violated due to the non-availability of Martin.[3]

The first issue is easily resolved when it is recognized that Martin merely set in motion and participated in a drug buy at the behest of the police, and that the police detectives thorougly surveilled and recorded the commission of the crimes and themselves testified to these occurrences. Any testimony elicited regarding Martin's history was completely irrelevant to the proof of the fact of the commission of the crimes. The trial court thus admitted into evidence essentially irrelevant testimony pertaining to the police officers' prior dealins with Martin; if error, this was harmless error. It was clearly then not error to refuse to allow questioning aimed at determining whether or not Martin had a prior criminal record. Martin's past criminal activities were irrelevant to proof of the prosecution's case.[4]

3/ The record reveals that the East Cleveland Detective Bureau had never had an address for Martin. Further, Martin had not been seen in the Cleveland area for several months and could not be located.

4/ This was not a case where, for example, the reliability of an informant

An affirmative answer to the second issue would require us to hold that the prosecution must always make subject to discovery the identity of, and call at trial as a witness, every participant in a crime. This holding would be erroneous. The prosecution must, of course, prove every element of its case, but the choice of witnesses with which to do so is purely that of the prosecution. The fact that the police officers in this case were able to observe the commission of a drug sale because of the cooperation of the drug purchaser did not make the drug purchaser, Martin, an accuser of appellant in the constitutional sense.

For the foregoing reasons, appellant's second assignment of error is overruled.

III.

Appellant's third assignment of error asserts that the trial court erred in refusing to admit into evidence an affidavit executed by one Thomas Bradford, Jr., and testimony of Raymond Grabow, appellant's former attorney, as to the contents of the affidavit. We find no error on the part of the trial court.

The record reveals no attempt to introduce the affidavit itself into evidence; clearly the court therefore

(fn.4 cont'd) is crucial because the informant supplied the necessary indicia of probable cause to issue a search warrant. See, e.g., Spinelli v. United States, (1969), 394 U.S. 410.

did not err in not admitting it. As to the testimony of Grabow, the evidence proffered was clearly hearsay. Appellant was attempting to have Grabow testify as to the contents of a statement made by Bradford. Since the record does not show that any exception to the hearsay rule was applicable, which exception appellant as proponent of the evidence had the burden of demonstrating, appellant's third assignment of error is without merit.

IV.

Since appellant's fourth, fifth, sixth and seventh assignments of error all require an examination of the sufficiency of the evidence, appellant has discussed them together in his brief. We shall, therefore, also consolidate these assignments for our discussion.

Appellant does not assert that the state's burden of proof has not been met except as to the identification of the person answering the phone at the Heatwave bar as appellant. We have reviewed all the evidence and find that the verdict was amply supported by the evidence. As to the identification of appellant's voice, the testimony of Detective Copeland that he recognized appellant's voice was properly admitted,[5] and it then became the province of the jury to determine the weight and credibility of this testimony. State v. DeHass, (1967), 10 Ohio St.2d 230. Thus, appellant's four final assignments of error are without merit.

5/ See our discussion of appellant's first assignment of error, supra.

For the foregoing reasons, we affirm the judgment of the Court of Common Pleas.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

PRYATEL, J. .....

PATTON, J., CONCUR...

.....

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APPEARANCES:

For plaintiff-appelle: John T. Corrigan
For defendant-appellant: Thomas L. Jacobs

N.B. This entry is made pursuant to the third sentence of Rule 22(d), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

STATE OF OHIO)
Cuyahoga County)ss

STATE OF OHIO,
Plaintiff,

vs.

HOWARD BROWN,
Defendant.

January Term, 1980
February 1, 1980

No. CR 43193 B

INDICTMENT
Rec'd for filing
Feb-7 1980
Gerald E. Fuerst, Clerk

INDICTMENT
Trafficking in Drugs,
R.C. 2925.03 w/ct Drug
Law 2925.13

JOURNAL ENTRY

The defendant herein having, on a former day of court, having been found guilty by a Jury of Trafficking in Drugs, R.C 2925.03, as charged in the first (1) count and found guilty of Drug Law, R.C. 2925.13, as charged in the second (2) count of the indictment was this day brought into court with his counsel present.

Thereupon the court inquired of the said defendant if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced: It is therefore ordered and adjudged by the court that defendant HOWARD C. BROWN be imprisoned and confined in the Columbus Correctional Facility, Columbus, Ohio, for a term of from one (1) year to ten (10) years on the first (1) count and for six (6) months on the second (2) count, and that he pay the cost of this prosecution for which execution is awarded. Said sentences to run concurrently with each other. Appeal bond set at $25,000.00 Real Estate or Surety as to the first count and $1,500.00 Real Estate or Surety on 2nd Count. Defendant remanded./Judge Perry B.Jackson

APPENDIX "C"

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

Constitutional Amendments:

AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. "

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

AMENDMENT XIV

"***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Rules of Evidence:

RULE 804(A)

(A) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the propronent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (B)(2), (3) or (4), his attendance or testimony) by process or other reasonable means. A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to

the procurement of wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

RULE 804(B)(3)

(B) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Ohio Revised Code:

§2925.03 Trafficking in drugs.
(A) No person shall knowingly do any of the following:

(1) Sell or offer to seel a controlled substance in an amount less than the minimum bulk amount as defined in section 2925.01 of the Revised Code;

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution,

or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another;

(3) Cultivate, manufactur, or otherwise engage in any part of the production of a controlled substance;

(4) Possess a controlled substance in an amount equal to or exceedings the bulk amount but in an amount less than three times that amount;

(5) Sell or offer to sell a controlled substance in an amount equal to or exceeding the bulk amount but in an amount less than three times that amount;

* * *

(7) Sell or offer to sell a controlled substance in an amount equal to or exceeding three times the bulk amount;

(8) Provide money or other items of value to another person with the purpose that the recipient of the money or items of value would use them to obtain controlled substances for the purpose of selling or offering to sell such controlled substances in amounts exceeding a bulk amount or for the purpose of violationg division (A)(3) of this section.

* * *

(C) If the drug involved is any compound, mixture, preparation, or substance included in Schedule I with the exception of marihuana or in Schedule II, whoever

violates this section is guilty of aggravated trafficking.

* * *

(D) If the drug involved is any compound, mixture, preparation, or substance included in Schedule III, IV, or V, whoever violates this section is guilty of trafficking in drugs.

§2925.13 Permitting drug abuse.
(A) No person, being the owner, operator, or person in charge of a locomotive watercraft, aircraft, or other vehicles as defined in division (A) of section 4501.01 of the Revised Code, shall knowingly permit such vehicle to be used for commission of a felony drug abuse offense.

* * *

(C) Whoever violates this section is guilty of permitting drug abuse, a misdemeanor of the first degree, and if the offender has previously been convicted of a drug abuse offense, permitting drug abuse is a felony of the fourth degree.